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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT TACOMA

11 BRENT D. SANBORN,

12 Plaintiff,

13 v.

14 KATY KALE, *et al.*,

15 Defendants.

CASE NO. 3:21-cv-05172-RJB

REPORT AND
RECOMMENDATION

NOTED: October 8, 2021

16 This matter is before the Court on referral of plaintiff's motion to proceed *in forma*
pauperis ("IFP") and proposed complaint. *See* Dkt. 5; *see also* Amended General Order 02-19.
Plaintiff proceeds *pro se*.

17 Plaintiff's amended proposed complaint fails to state a claim upon which relief can be
granted. The Court has offered plaintiff an opportunity to amend his complaint already, and
amendment has proved futile. Therefore, the Court recommends that the IFP motion be denied
and that this matter be dismissed without prejudice.

18 **BACKGROUND**

19 Plaintiff initiated this matter in March 2021 and seeks to proceed IFP. Dkts. 1, 5.
Previously, the Court reviewed plaintiff's proposed complaint and found that plaintiff failed to

1 explain how he “suffered a violation of a constitutional or federal statutory right” (Dkt. 6, at 3),
 2 how a private entity acted under color of state law (Dkt. 6, at 4), or how the private entity
 3 personally participated in the alleged harm. Dkt. 6, at 4. Moreover, plaintiff listed a criminal
 4 statute that did not give rise to civil liability. Dkt. 6, at 4. The Court declined to rule on
 5 plaintiff’s IFP motion until he filed a complaint that corrected these deficiencies. Dkt. 6, at 5.

6 Plaintiff has filed an amended proposed complaint, now naming a “GSA Administrator”
 7 (formatting removed), Katy Kale, and a “Clark County Clerk” (formatting removed), Scott
 8 Weber. Dkt. 11, at 2. Plaintiff asserts that the Court has federal question jurisdiction over his
 9 claims against these defendants. Dkt. 11, at 2. The basis for his claims is unclear, but liberally
 10 construed, appears to be that defendant Weber misappropriated funds deposited with him and
 11 that should have been returned to plaintiff. *See* Dkt. 11, at 5.

12 DISCUSSION

13 In proceedings where a plaintiff proceeds (or seeks to proceed) IFP, 28 U.S.C. §
 14 1915(e)(2)(B) authorizes the Court to dismiss the case “at any time” if the case is “frivolous or
 15 malicious” or the complaint “fails to state a claim upon which relief may be granted[.]”

16 Here, as the basis for the alleged constitutional or federal rights violated, plaintiff lists a
 17 myriad of statutes, regulations, and other authorities. Most of these authorities either clearly do
 18 not apply or cannot be vindicated by a private right of action. For instance, plaintiff cites Fed. R.
 19 Civ. P. 24(a), but the Federal Rules of Civil Procedure do “not abridge, enlarge or modify any
 20 substantive right.” 28 U.S.C. § 2072(b). Plaintiff also cites a portion of the Federal Acquisition
 21 Regulations System (“FAR”), which was “established for the codification and publication of
 22 uniform policies and procedures for acquisition by all executive agencies.” 48 C.F.R. § 1.101.
 23 Specifically, plaintiff cites a provision governing general contracting requirements and directing
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1 the use of certain standard and optional forms “when a bid bond, performance or payment bond,
2 or an individual surety is required.” 48 C.F.R. 28.106-1. This provision is part of certain
3 regulations that apply where the federal government obtains financial protection against loss
4 under contracts that result from the use of sealed bid or negotiation methods. 48 C.F.R. §
5 28.000. Such regulations create no cause of action for plaintiff in this case and are not clearly
6 related to his claim regarding the county clerk.

7 Plaintiff further cites 18 U.S.C. §§ 242, 641, and 1341, portions of the United States’
8 criminal code that do not provide for a private right of action. *See Allen v. Gold Country Casino,*
9 464 F.3d 1044, 1048 (9th Cir. 2006) (section 242); *Chilkat Indian Vill. v. Johnson*, 870 F.2d
10 1469, 1472 (9th Cir. 1989) (section 641); *Reyes v. Flagg*, No. 218CV01727GMNBNW, 2020
11 WL 5645326, at *2 (D. Nev. Sept. 22, 2020), *report and recommendation adopted*, No.
12 218CV01727GMNBNW, 2020 WL 6152972 (D. Nev. Oct. 20, 2020) (section 1341). Plaintiff
13 cannot vindicate these statutes through a civil suit. Moreover, although plaintiff cites to 18
14 U.S.C. § 153, a portion of the criminal code related to actions occurring in a bankruptcy
15 proceeding, plaintiff neither establishes a private right of action under this statute nor that this
16 case involves a bankruptcy. Further, plaintiff cannot found his federal question lawsuit on the
17 violation of a Washington state statute. *See* Dkt. 11, at 3 (citing RCW 12.04.207).

18 Plaintiff cites 31 U.S.C § 3113, which allows for the U.S. Secretary of the Treasury to
19 accept gifts from private citizens in order to reduce the public debt. And plaintiff cites to various
20 regulations and statutes concerning the Internal Revenue Service, including a regulation
21 explaining when the IRS must release a lien or discharge property (26 C.F.R. § 301.6325-1), and
22 statutes defining the value of a decedent’s taxable estate (26 U.S.C. § 2038) and matters subject
23 to gift taxes. 26 U.S.C. § 2514 (powers of appointment). Again, these provisions do not have
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1 any bearing on the substance of this case, which pertains to alleged misappropriation by a county
2 clerk.

3 Plaintiff cites the Administrative Procedures Act, 5 U.S.C. § 706, but this provision
4 allows for suit against federal—not county or state—officials. *See* 5 U.S.C. § 701(b)(1). The
5 Court notes that although plaintiff does name someone who appears to be a federal employee (a
6 U.S. General Services Administrator), plaintiff's amended complaint is entirely devoid of factual
7 allegations of how this defendant participated in or had anything to do with the alleged
8 misappropriation. Plaintiff's amended complaint continues to be deficient in its failure to bring
9 specific allegations related to each defendant, even though the Court previously warned plaintiff
10 that his complaint would be dismissed if he failed to explain “exactly what each individual or
11 entity did or fail to do” and how this action or inaction was “connected to the violation of
12 plaintiff's constitutional or statutory rights[.]” Dkt. 6, at 5.

13 Plaintiff also cites 42 U.S.C. § 1983, which allows for a cause of action where one acting
14 under color of state law has violated rights guaranteed by the Constitution or federal statute. As
15 noted above, plaintiff has failed to show that he is entitled to relief under most of the authority
16 cited, so that he cannot rely on these authorities as a basis for his § 1983 claim, either.

17 Plaintiff also appears to argue that the U.S. Constitution was violated because the county
18 defendant's actions violated due process, the Takings Clause, and the Ninth Amendment.
19 Regarding his due process claim, intentional deprivation of property does not violate due process
20 when there is a meaningful post-deprivation remedy. *See Hudson v. Palmer*, 468 U.S. 517, 533
21 (1984) (intentional deprivation of property does not violate due process when meaningful post-
22 deprivation remedy is available). The Ninth Circuit has specifically held that an adequate post-
23 deprivation remedy for confiscated property is available in the State of Washington through, for
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1 example, the Washington State Tort Claims Act. *Joshua v. Newell*, 871 F.2d 884, 887 (9th Cir.
 2 1989). This merits dismissal of the due process claim. *Accord Eckard v. Nikolina*, No. C19-
 3 881-RSM, 2019 WL 3291036, at *2 (W.D. Wash. June 12, 2019), *report and recommendation*
 4 *adopted*, No. C19-881 RSM, 2019 WL 3286178 (W.D. Wash. July 19, 2019) (citing RCW
 5 4.92.090, 4.96.010); *Johnson v. Key*, No. 2:17-CV-00391-SMJ, 2018 WL 11229150, at *2 (E.D.
 6 Wash. Jan. 24, 2018).

7 Plaintiff's Takings Clause claim fares no better. Liberally construing his amended
 8 complaint, he is alleging that the court clerk "misappropriate[ed]" and "convert[ed]" (that is,
 9 "stole") funds. Dkt. 11, at 3 (capitalization omitted); *see also* Dkt. 11, at 6 ("Defendants are in
 10 breach of trust and misappropriated the funds. . . ."). But a Takings Clause is not appropriate for
 11 a claim of an "impermissible" taking (for instance, a theft or misappropriation). *See Lingle v.*
 12 *Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005); *Crown Point Dev., Inc. v. City of Sun Valley*, 506
 13 F.3d 851, 856 (9th Cir. 2007). Accordingly, the allegations of the amended complaint do not
 14 give rise to any claim under the Takings Clause.

15 Finally, to the extent that plaintiff brings a claim under the Ninth Amendment, that
 16 amendment "has never been recognized as independently securing any constitutional right, for
 17 purposes of pursuing a civil rights claim." *Strandberg v. City of Helena*, 791 F.2d 744, 748 (9th
 18 Cir. 1986), *cited with approval in Nickler v. City. of Clark*, 752 F. App'x 427, 429 (9th Cir.
 19 2018).

20 Separately, plaintiff alleges that defendant Weber was "acting as Clark County Clerk"
 21 when he took the actions at issue. Therefore, quasi-judicial immunity bars a suit for damages
 22 against defendant Weber, even if the Court found that plaintiff stated a claim against that official

1 under 42 U.S.C. § 1983. *See Mullis v. U.S. Bankruptcy Court for Dist. of Nev.*, 828 F.2d 1385,
 2 1390 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988)).

3 For all these reasons, plaintiff's complaint fails to state a claim upon which relief can be
 4 granted. Indeed, plaintiff's allegations appear to have little factual basis and border on the
 5 frivolous. For instance, plaintiff alleges that there is "no lawful money of account" that "exists
 6 in circulation" (Dkt. 11, at 4) and that he requires relief from "indenture[d] servitude." Dkt. 11,
 7 at 7. To the extent he can plausibly allege that a county clerk misappropriated funds, his claims
 8 of improper conduct in state court are best addressed through state court. Leave to amend has
 9 already been granted, and the Court finds that offering plaintiff another chance to amend his
 10 complaint would be futile.

11 CONCLUSION

12 The District Court should deny the motion to proceed IFP and should dismiss this matter
 13 without prejudice. Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall
 14 have fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.
 15 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de*
 16 *novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a result in a
 17 waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985);
 18 *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating
 19 the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on
 20 **October 8, 2021**, as noted in the caption.

21 Dated this 22nd day of September, 2021.

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 23 J. Richard Creatura
 24 Chief United States Magistrate Judge